



State of California  
**Commission on Judicial Performance**  
455 Golden Gate Avenue, Suite 14400  
San Francisco, CA 94102-3660  
(415) 557-1200  
FAX (415) 557-1266  
Web Site: <http://cjp.ca.gov>

Date: August 29, 2017

To: Persons and Organizations Interested in Rules Relating to Proceedings of the Commission on Judicial Performance

From: Commission on Judicial Performance  
Victoria B. Henley, Director-Chief Counsel

Subject: Invitation to Comment on Proposed Amendments to Rules of the Commission on Judicial Performance

---

The Commission on Judicial Performance recently completed its 2016 biennial rules review process. (Policy Declaration 3.5.) During that process, certain additional proposed rule amendments were brought to the commission's attention, which the commission determined should be acted upon prior to the next biennial rules review. Pursuant to policy declaration 3.5, the commission seeks public comment on amendments to rule 117 [use and retention of commission records] and on an amended version of a proposed new rule for reconsideration of closed complaints that was previously circulated for public comment.

The proposed amendments being circulated for public comment with a brief explanation of the changes and a form for submission of comments can be found on the commission's website at <http://cjp.ca.gov> under "Announcements" on the Home page and under "Legal Authority." **The deadline for comments is October 30, 2017.** Thereafter, individuals and organizations may submit responses to comments until November 29, 2017.

Copies of rule proposals, comments and responses to comments are available to the public upon request. (See Policy Declaration 3.5 for the commission's rules review procedures.)

Comments and responses to comments should be submitted in writing by mail or facsimile to:

Commission on Judicial Performance  
Attn: Janice M. Brickley, Legal Advisor to Commissioners  
455 Golden Gate Avenue, Suite 14400  
San Francisco, CA 94102  
FAX: (415) 557-1266

## Rule Proposal No. 1

### **PROPOSED AMENDMENT TO RULE 117 TO DELETE TIME LIMITATION ON USE OF COMMISSION RECORDS**

The proposed amendment is as follows [amended language is reflected with underlines, deleted language with ~~strikeouts~~].

#### **Rule 117. ~~Use and~~ Retention of Commission Records**

##### **~~(a) (Use of records outside the limitation period)~~**

~~Commission records of complaints against a judge shall not be used for any purpose if the complaints (1) relate to actions occurring more than six years prior to the commencement of the judge's current term and (2) did not result in issuance of an advisory letter, public or private admonishment, censure, or removal of the judge.~~

**~~(b) (Records disposition program)~~** The commission shall adopt a records disposition program designed to dispose of these records of complaints against a judge taking into consideration constitutional language and case law, which cannot be used for any purpose under this rule or which are no longer necessary for the performance of its duties.

#### **Explanation of Proposed Amendment**

Rule 117 was adopted in 1996, when the commission was given rulemaking authority by constitutional amendment pursuant to proposition 190. It is almost identical to former California Rule of Court, rule 904.6(1), adopted by the Judicial Council; the only difference is that the former rule of court made no reference to public admonishments, which did not exist prior to 1995.

The time limitations in rule 117 track the time limitations provided in the California Constitution for censure and removal of a judge. The California Constitution states that a judge may be censured or removed for willful or prejudicial misconduct "occurring not more than 6 years prior to the commencement of the judge's current term." (Cal. Const., art. VI, § 18(d).) There is no similar constitutional time limitation on the issuance of public or private admonishments or advisory letters. In *Dodds v. Commission on Judicial Performance* (1995) 12 Cal.4th 163, two justices pointed out in a concurring and dissenting opinion, "The Commission's constitutional power of private admonishment derives from a discrete, self-contained sentence which, unlike the provisions for censure and removal, specified *no* time limitation on the conduct which may be considered. [Citation.] It appears the Commission may therefore take the 1987 incident [beyond the constitutional time limitation] into account for admonishment purposes, and I do not read the majority's opinion as holding otherwise." (*Id.* at p. 185, fn. 6.)

The commission is of the view that current rule 117 does not adequately protect the public to the extent that it could be interpreted as precluding the commission from considering complaints and other records of conduct that took place more than six years prior to the judge's current term unless the conduct resulted in discipline. In determining whether to open an investigation and impose discipline, the commission takes the age of the conduct into consideration, particularly in terms of the memory of witnesses and the availability of evidence. However, there can be matters in which the age of the conduct does not detrimentally affect the investigation and the judge's right to present a defense, such as when there is a transcript or the judge admits the conduct. Also, at times, there is good reason why the complaint did not come to the commission's attention until long after the alleged misconduct occurred.

Investigation and consideration of misconduct beyond the time limitations of rule 117 is particularly important and relevant when there are also allegations of recent similar misconduct. Whether the conduct is an isolated incident or reflects a pattern of misconduct is an important factor in the commission's determination of the appropriate level of discipline. (E.g., *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 918.)

### **Rule Proposal No. 2**

## **PROPOSED NEW RULE FOR RECONSIDERATION OF CLOSED COMPLAINTS**

The proposed new rule is as follows:

### **RECONSIDERATION OF CLOSED COMPLAINT**

- (a) A complainant may request reconsideration of a complaint closed by the commission at initial review for failure to state sufficient facts or information to establish a prima facie case of misconduct, if the complainant provides new material evidence of misconduct committed by the judge that provides a sufficient basis for investigation.
- (b) A request for reconsideration must be made not later than 60 days after the date of the communications informing the complainant of the dismissal, unless there is good cause for submitting the request beyond that time.
- (c) The commission shall consider every request for reconsideration, submitted in accordance with this rule.
- (d) The commission shall deny a request for reconsideration if the complainant does not meet the requirements under subsection (a). The commission shall notify the complainant of the denial in writing.
- (e) The commission may grant a request for reconsideration if the complainant meets the requirements under subsection (a).
- (f) After granting a request, the commission shall vote to: (1) affirm the original decision to dismiss the complaint; or (2) reopen the complaint.

- (g) The commission shall notify the complainant of the results of the commission's vote under subsection (f) in writing.
- (h) The commission shall conduct an appropriate investigation of a complaint reopened under subsection (f)(2).
- (i) A complainant may request reconsideration of a dismissed complaint under this section only once.

### **Explanation of Proposed New Rule**

Complainants are not parties to the commission matter, and therefore are not legally entitled to an appellate remedy if the complaint is closed. In practice, the commission does reconsider a closed complaint if new information reflecting a prima facie showing of misconduct is provided. (See Policy Declaration 1.1.5.) The commission proposes that a process for reconsideration of a complaint be formalized in a rule to provide notice to complainants and a transparent and formalized process.

During the 2016 biennial rules review, the commission solicited comments on a similar proposed new rule for reconsideration of closed complaints. A number of the comments received were in favor of having a process for reconsideration of closed complaints, but objected to the 60-day limitation on submitting a request for reconsideration (that was included in that proposed rule). Other comments objected to the rule on the grounds that it could indefinitely extend commission proceedings and deprive the judge of closure after being informed that the matter had been closed. In view of those comments, the commission made amendments to the proposed rule, and seeks public comment on the amended version.

The first amendment to the proposed rule allows for a good cause exception to the 60-day requirement for submitting a request for reconsideration. In the commission's view, requests for reconsideration should be made as promptly as possible because memories fade and evidence can become stale or difficult to obtain. Moreover, a judge should be given a chance to respond to the allegation(s) as close in time to the alleged event as possible. However, the commission recognizes that there may be circumstances where the complainant for good cause does not become aware of the new information until sometime later.

The comments concerning providing the judge with closure and extending commission proceedings appear to be based on the assumption that the rule would apply to complaints closed after the commission has contacted the judge and conducted a staff inquiry or preliminary investigation. The commission intended the rule to apply only to matters closed at the commission's initial review of the complaint because the complaint did not state sufficient facts or information to establish a prima facie case of misconduct. In those matters, an investigation has not been conducted and the judge is not contacted. Thus, any new material information is unlikely to be discovered by the commission unless submitted by the complainant. On the other hand, if the commission opens the matter as a staff inquiry or preliminary investigation, staff conducts a full investigation and the judge is contacted and given the opportunity to submit additional information (unless closed based on the information obtained by staff which establishes that the allegation is unfounded). During the investigation, the complainant or any other person can submit additional information to the investigating attorney.

Based on the comments received, the commission recognizes that the proposed rule that was circulated for public comment could be interpreted as applying to matters closed after an investigation. Accordingly, the new proposed rule has been amended to limit requests for reconsideration to matters closed at the initial review. Because a judge is not contacted by the commission about the allegations when a matter is closed at the initial review, the concerns about depriving a judge of closure would not apply.

Adoption of this rule would be subject to receiving additional funding as it would require additional staff time to review requests for reconsideration and present those requests to the commission, and to conduct further investigation when the request is granted.